United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 11, 2003

TO : Marta Figueroa, Regional Director
Efrain Rivera-Vega, Regional Attorney
Region 24

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Triangle Construction & Maintenance 530-6050-2512
24-CA-9477 530-6050-4100

This Section 8(a)(5) case was submitted for advice on whether requiring applicants for employment to sign a mandatory arbitration agreement waiving their individual statutory right to sue in court is a mandatory subject of bargaining. We conclude that because the mandatory arbitration policy implemented applied only to applicants, and because no applicants have been hired since the policy's implementation, the new policy was not a mandatory subject of bargaining. Thus, the Employer had no duty to bargain to impasse over its implementation.

FACTS

Our Virgin Islands Labor Union (OVILU) is the certified collective bargaining representative of the construction and maintenance employees of Triangle Construction and Maintenance (Employer). The parties have a collective bargaining agreement effective from March 18, 2002, to March 17, 2005.

Around December 17, 2002, the Employer gave Union president Terrence Nelson a letter and a copy of a dispute resolution agreement that would apply to all applicants for employment. The letter informed Nelson that beginning on January 2, 2003, all applicants would be required to sign the dispute resolution agreement (DRA) in order to be considered for employment.

The DRA provides that an applicant would waive his/her right to court and would submit to the exclusive arbitration of:

> . . . any and all claims, disputes or controversies arising out of or relating to: (1) my application or candidacy for employment; (2) an alleged wrongful decision not to hire me; (3) any statutory claim for discrimination or harassment on the basis of age, sex, race,

> religion, or disability, national origin under [] state, federal or territorial law that are not pursued exclusively through the grievance and arbitration provisions of the CBA; and (4) any claims for personal injury or property damage arising in any way from my presence at the HOVENSA refinery . . . .

The DRA did not conflict with the parties' collective bargaining agreement or affect the applicants' rights to file unfair labor practices or other claims with the Board.

Nelson told the Employer that the Union disagreed with the new policy, which had been a subject of bargaining in the previous negotiations. Nelson threatened to go to the press. The Employer told Nelson not to do anything yet and offered to reconsider its proposal.

The Union and Employer never discussed the proposal again, and the Union immediately filed a charge.

The Employer has not hired any new employees since implementing the new policy, nor has it accepted any applications for employment. Even though the Employer told Nelson that it would reconsider the policy, the Employer has confirmed that it has in fact implemented the new policy.

ACTION

We conclude that because the dispute resolution policy does not apply to active employees or "vitally affect" their terms and conditions of employment, the Employer had no obligation to bargain with the Union over the implementation of the policy. Thus, absent withdrawal, the charge should be dismissed.

It is well established that applicants for employment are not employees and that an employer has no obligation to bargain about matters concerning applicants unless those matters "vitally affect" the terms and conditions of employment of unit employees.[1] To "vitally affect" unit employees, the effect on unit employees must be substantial and nonspeculative.[2] In Star Tribune, for instance, the

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[1] Star Tribune, 295 NLRB 543, 546-47 (1989); see Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 179 (1971); United Technologies Corp., 274 NLRB 1069, 1070 (1985), enfd. 789 F.2d 121 (2d Cir. 1986).

[2] Pittsburgh Plate Glass, 404 U.S. at 180 (holding discontinuation of medical benefits for retirees did not

Board held that the implementation of drug and alcohol testing of applicants did not "vitally affect" unit employees by altering the composition of the bargaining unit.[3] The Board reasoned that if "applicant drug testing is deemed to vitally affect the terms and conditions of employment of unit employees solely on the basis that unit composition is affected, then any applicant qualification could be subject to this argument."[4]

In Kysor Industrial Corp.,[5] the Board clarified the reach of Star Tribune, indicating that even when an applicant drug testing policy would subject an applicant to testing during his employment if hired, an employer still had no obligation to bargain with the union before implementing the policy. In Kysor, the employer began drug testing certain employees four years after their hire. The employer claimed that the employees had consented to the drug testing in their employment applications and that the union had waived its right to bargain about it.[6] The ALJ rejected this argument, reasoning that under Star Tribune, the company had no obligation to bargain with the union before instituting the consent form procedure. The ALJ reasoned that it "would not vitally affect the terms and conditions of unit employees, and become a mandatory subject of bargaining, unless and until the Company instituted or informed the Union that it sought to institute a practice of drug testing employees."[7] Thus, because the consent forms were not a mandatory subject of bargaining when the applicants signed them, the union did not waive its right to bargain about the topic.[8]

"vitally affect" unit employees because "benefits that active workers may reap by including retired employees under the same health insurance contract" were "speculative and insubstantial at best").

[3] 295 NLRB at 548.

[4] Id.

[5] 307 NLRB 598, 598, 602 (1992), enfd. 9 F.3d 108 (6th Cir. 1993).

[6] Id. at 601-02.

[7] Id. at 602.

[8] While the Board affirmed the case on other grounds, it explicitly agreed with the ALJ's analysis on this point. Id. at 598-99.

We conclude that under the relevant case law, the Employer here had no duty to bargain with the Union before implementing the mandatory DRA policy for applicants. First, applicants for employment are clearly not employees, even though the DRA policy purports to apply if the applicant is hired. Thus, under the test set forth in Star Tribune and as applied in Kysor, the possible effect on future employees is insufficient to render the DRA application policy a mandatory subject of bargaining before any applicants are hired under the policy. Second, the implementation of the DRA policy clearly does not "vitally affect" the terms and conditions of employment of any active employees.[9] Thus, because the policy applies only to applicants and no applicants have been hired, the policy was not a mandatory subject of bargaining.

Our finding of no violation here is based on the specific facts of this case — namely, that the DRA policy does not apply to current employees or "vitally affect" them. Thus, we do not decide here whether a DRA policy is a mandatory subject of bargaining if offered to current employees; whether the policy becomes a mandatory subject of bargaining after an applicant is hired; or whether it would constitute an unfair labor practice if the Employer attempted to enforce the policy on current employees and the Union objected. Rather, we conclude here that because the DRA policy does not pertain to current employees or "vitally affect" their interests, it is not a mandatory subject of bargaining.

Accordingly, absent withdrawal, the charge should be dismissed.

B.J.K.

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[9] Cf. Star Tribune, 295 NLRB at 549 (discrimination at hiring stage "vitally affects" unit employees because a union's ability to eliminate discrimination in workforce would be severely impeded if it were required to wait until hiring process completed and employment relationship begun before investigating actual or suspected discrimination).